

**DISCUSSION OF THE PUBLIC NECESSITY ET.AL.**  
**STANDARD**

PREPARED BY:

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RE: Discussion on the Public Necessity et. al. Standard

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**Issue:** How must a bank regulator interpret and then apply the “convenience and needs” standard or the “convenience and advantage” standard when deciding whether to grant a bank charter, to permit a bank to branch, or to issue a pawnbroker license? What factors should be considered in this evaluation?

**Conclusion:** Whether the statute requires the regulator to find a “convenience and advantage” or a “convenience and need” before permitting a bank to branch, granting a bank charter, or issuing a pawnbroker license, these statutory directives state essentially the same standard: an obvious community need in light of the surrounding circumstances; more than a mere convenience but less than an absolute necessity. These standards attempt to balance between the public interest for banking services against the equally important interest of avoiding unsafe banking practices. These standards do not promote monopoly or encourage a restraint of trade. Bank regulators have the discretion as to which factors it considers in the analysis, and whether the determination of one factor has a controlling effect upon the ultimate conclusion of the issue. Regulators may consider, among other things, factors such as population, population growth, industry of the area, wealth, potential economic growth of the area, existing financial services, and local opinion in the analysis of the issue.

## **Discussion:**

### **I. Statutory Provision and Interpretation**

#### **A. Statutory Language**

Congress and the state legislatures have not used the identical language within their respective banking statutes to establish the standard of ensuring bank safety and promoting reasonable competition between banks. 74 Banking L. J. 921, 924 (1957). Various phrases which have been used to state this guideline include “public convenience and advantage”, “convenience and need”, “convenience and necessity”, “public interest”, or “reasonable public demand.” Id.

The Financial Institutions Act (Title 28) of the Indiana Code also makes use of several of these phrases to set the standard. IC 28-2-13-19, which regulates the establishment of a branch, requires the regulator to find that the “public convenience and advantage will be served and promoted by” the proposed branch. IC 28-2-13-19 West Ann. Ind. Code (1987 and Supp. 1994). IC 28-11-5-4, which describes the application approval of the establishment of a bank, requires the regulator to find that the “convenience and needs of the community” are served by the proposed institution. Id. at 28-11-5-4. Finally, IC 28-7-5-8 states that, before issuing the license, the regulator must find that the proposed pawnbroker meets the “convenience and needs of the public.” Id. at 28-7-5-8.

## **B. Interpretation of the Various Phrases**

To properly interpret the governing statutes, regulator must determine whether these different statutory phrases of “convenience and need” or “convenience and advantage” or “public necessity” require different interpretations, or whether the same general standard may be applied no matter which statutory directive is given.

### **1. Different Standard**

In Department of Financial Institutions v. Wayne Bank and Trust, 178 Ind.App. 265, 385 N.E.2d 482 (Ind. App. 1979), the court distinguished between two standards, one used for granting a bank charter and the other used for permitting a bank to branch. The court concluded that a showing a ‘public convenience and advantage’ is based upon a less demanding standard than is a showing of ‘public necessity.’ Id. At 279, 484. In its analysis, the court focused on the use of distinct terminology and decided that competition, as an element, should influence the Department’s ultimate determination, whether to grant or deny the application, less under the “convenience and advantage” standard than under the “public necessity” standard. Id. at 279, 485.

In Peoples Finance Services of Waynesboro v. Beneficial Finance Corp., 263 S.E.2d 59 (Va 1980), the Virginia Supreme Court made a similar distinction between the “convenience and advantage” standard and “the public interest” standard. First, the Court noted that the Virginia Banking Act and the Virginia Savings and Loan Act had been amended in 1978 to adopt the “public interest” standard, which established the public interest specifically as an element to be considered in the regulator’s analysis; but at the same time, the Virginia Small Loan Act did not receive a similar change. Id. at 62. As a result of the amendment, the analysis of a small loan office application is less rigorous than the analysis of a bank or savings and loan application. Id. In addition, the Court recognized that the purpose of the statutes and rules governing the conduct of banks and savings and loans was to afford greater protection from competition than the protection intended for small loan offices. Id.

## 2. Same Standard

Although some courts have interpreted that the different phrases required distinct considerations, others have decided that legislatures intended for these different phrases to receive the same analysis. In Appeal of the Incorporators of Manchester Savings Bank, 412 A.2d 421 (N.H. 1980), the New Hampshire Supreme Court reviewed a denial of an application to establish a new savings bank. The Court found that the “public convenience and advantage” standard of RSA 386-A:14 imposed no additional criteria to the analysis than did the “useful purpose” standard of a previous subsection. Id. At 427. In fact, the Court interpreted the RSA 386-A:14 “public and convenience” standard merely as a restatement of the “useful purpose” standard of RSA 386-A:6-I. Id. See also Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1967) (Similarly, the Texas Supreme Court decided that the “public need” standard had essentially the same meaning as the “public necessity” standard from another section of the banking code. Id. at 358.).

Others have found that the standards applied to the analysis will not differ greatly regardless of the exact wording of the particular statutes. 74 Banking L. J., 921, 925 (1957). In fact, although the statutory directives in the sections relating to branch banking differ slightly from those relating to the establishment of new banks, the regulators have construed both as requiring the same analysis. Id. at 927.

Finally, it can be argued that Department of Fin. Inst’n. v. Wayne Bank and Trust Co., 178 Ind.App. 265, 385 N.E.2d 482 (1979) does not necessarily stand for the notion presently that the standard controlling the establishment a new bank and the standard controlling the establishment of a branch require separate interpretations. In that case, the court differentiated between IC 28-1-2-16 (“public necessity” standard for establishing a new bank) and IC 28-1-17-1 (“public convenience and advantage” standard for establishing a branch). Id. at 278, 484. Currently, neither of those sections are the governing sections, see P.L. 265-1985, Sec. 7 and P.L. 42-1993, Sec. 103; instead, IC 28-11-5-4 governs the establishment of a new bank, and IC 28-2-13-19 governs the establishment of a new branch. See IC 28-11-5-4 & IC 28-2-13-19 West Ann. Ind. Code (1987 and Supp. 1994). In Wayne Bank, the court differentiated between “convenience and advantage” and “public necessity,” yet while the provision which regulates branching has maintained the same standard, “public interest” is not the standard for establishing a new bank. Compare IC 28-1-2-26 West Ann. Ind.Code (1987) and IC 28-11-5-4 West Ann. Ind.Code (Supp. 1994). As a result, it can be argued that the distinction articulated in Wayne Bank is moot and cannot support the argument that the standard governing the granting of a bank charter must receive a more rigorous analysis than one governing bank branching. See Department of Fin. Inst’n v. Wayne Bank and Trust Co., 178 Ind.App. 265, 385 N.E.2d 482 (1979).

## **II. Formation and Use of the Standard**

### **A. Definition of the Standard**

Based on the discussion above, the same legal standards can be applied to phrases such as “public interest”, “convenience and advantage,” or “convenience and needs” for the purpose of interpreting IC 28-2-13-19, IC 28-11-5-4, and IC 28-7-5-8. See IC 28-2-13-19, IC 28-11-5-4, & IC 28-7-5-8 West Ann. Ind. Code (1987 and Supp. 1994). In order to find the analytical test derived from the standard, the statutory provision must be read in light of a judicial definition or interpretation of the statutory language.

In Farmers State Bank v. Dept. of Fin. Inst’n, 171 Ind.App. 145, 355 N.E.2d 277 (1976), the court defined the standard by following well established interpretations made; by the Supreme Courts of Michigan, Minnesota, and Texas. See State ex. Rel. Dybdal v. State Sec. Comm., 176 N.W. 759 (Minn. 1920); Moran v. Nelson, 33 N.W.2d 772 (Mich. 1948); Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1967). The Indiana court stated that “public necessity” demonstrated an obvious community need in light of the surrounding circumstances; it required “more than a mere convenience but less than an absolute or indispensable need.” Farmers State Bank at 149, 280. The court added that the Department may analyze the convenience of the establishment if the situation demonstrated some underlying need. Id.; see also Dept. Of Fin. Inst’n. V. Colonial Bank & Trust Co., 176 Ind.App. 368, 372, 373, 375 N.E. 2d 285, 288 (Ind.App. 1978), cert. denied, 439 U.S. 1116 (1979); accord State Bank. Bd. v. First St. Bank of Gainsville, 618 S.W.2d 905 (Civ.App.Tex. 1981); Chimney Rock Nat. Bank of Houston v. State Bank. Bd., 376 S.W.2d 595 (Civ.App.Tex. 1964); Suburban Bank of Kansas City v. Jackson Co. St. Bank, 330 S.W.2d 183 (K.C.Ct.App.Mo. 1959).

### **B. Application of the Standard**

With this judicial definition of the standard, see Farmers State Bank v. Dept. of Fin. Inst’n, 171 Ind.App. 145, 355 N.E.2d 277 (1976); see also Moran v. Nelson 33 N.W.2d 772 (Mich. 1948); Gersts v. Nixon, 411 S.W.2d 350 (Tex. 1967), an analytical test may be constructed to aid the regulator with the application of the standard to different factual situations.

The Supreme Court of Missouri found the “convenience and needs of the community” standard to be a practical business test “which involved balancing the public interest in satiating the economic demand for banking services through the promotion of competition against the equally important public interest in avoiding unsafe banking practices.” Bank of Crestwood v. Gravois Bank, 616 S.W.2d 505, 512 (Mo. 1981).

Although the courts have given this standard a very broad definition (between mere convenience and absolute necessity, see Farmers State Bank at 149, 280), one author stated that the “inability to define the clause is not a serious obstacle to the application of the standard as long as one

bears in mind its objectives and thinks in terms of need for banking services.” 74 Banking L.J. 921, 928 (1957).

Following this directive, the purpose of this provision was originally stated in State ex. rel. Dybdal v. State Sec. Comm., 176 N.W. 759 (Minn. 1920), which found that the object was to guard the public and the public interests of the community,” which requires banks to be” reasonably competitive and fully adequate for the needs of the community.” Jackson v. Valley Nat. Bank of Eagan Twnshp., 152 N.W.2d 472, 474 (Minn. (1967). Another court found that the purpose of this standard was to insure a balanced market structure while avoiding excess monopoly on one hand and cut-throat competition on the other. Bank of Crestwood v. Gravois Bank, 616 S.W.2d 505, 513 (Mo. 1981).

Other courts have stated what legislatures had not intended as the purpose for this statutory provision. The Supreme Court of Mississippi stated that the purpose of this provision was not “to create or maintain monopoly nor encourage a restraint of trade.” First Nat. Bank of Vicksburg v. Martin, 238 S.2d 856, 859 (Miss. 1970). Another court found that the purpose of the “convenience-and-advantage” standard was not “to protect the market share of existing licensees from competition of other lenders.” Peoples Fin. Serv. V. Beneficial Fin., 263 S.E.2d 59, 63 (Va.. 1980); accord 74 Banking L.J. 921, 929 (1957).

As the definition of the standard rests some where between a mere convenience and absolute necessity, see Farmers State Bank v. Dept. of Fin. Inst’n, 171 Ind.App. 145, 149, 355 N.E.2d 277, 280 (1976), the comparison between maintaining monopolies on one have and permitting unsafe competition on the other marks the delicate balance which the regulator seeks to protect. See Jackson v. Valley Nat. Bank of Eagan Twnshp., 152 N.W.2d 472, 474 (Minn. (1967). Yet, courts have found that even if a community is adequately served by existing banks, this **does not require** regulators to deny new applications for new branches or charters for new banks. Dept. of Fin. Inst’n v. Wayne Bank & Trust Co., 178 Ind.App. 265, 273, 381 N.E.2d 1100, 1105 (Ind.App. 1978), rehearing denied, 178 Ind.App. 265, 276, 385 N.E.2d 482 (Ind.App. 1979). The court directed the regulator to analyze the “general economy of the area” to determine the “reasonable potential” for another bank or a branch of a pre-existing bank, and to see if the addition could occur “without causing excessive competition and endangering the existing banks and the banking structure at large.” Id. At 273, 1105. See also State ex. rel. Dybdal v. State Sec. Comm., 176 N.W. 759, 760 (Minn. 1920); Peoples Fin. Service of Waynesboro, Inc. v. Beneficial Fin. Corp., 263 S.E.2d 59, 63 (Va. 1980); Suburban Bank of Kansas City v. Jackson Co. St. Bank, 330 S.W.2d 183, 187 (K.C.Ct.App.Mo. 1959); First Nat. Bank of Worland v. Financial Inst. Bd., 616 p.2d 787, 798 (Wyo. 1980) (McClintock dissenting).

### **III. Factors to be Considered in the Analysis**

In order to effectuate the purpose of the “convenience and need” or “convenience and advantage” standard (to guard the public and the public interests against imprudent banking; State ex. rel. Dybdal v. State Sec. Comm., 176 N.W. 759, 760 (Minn. 1920) by applying the judicially determined definition of that standard (an obvious community need in light of the

surrounding circumstances; more than a mere convenience but less than an absolute or indispensable need; Farmers State Bank v. Dept. of Fin. Inst'n, 171 Ind.App. 145, 149, 355 N.E.2d 277, 280 (1976) the administering agency must analyze relevant factors. "It is apparent that the real question is what are the factors that can be used to warrant the inference that the new banking facility should or should not be established." 74Banking L.J. 921, 931 (1957).

The Supreme Court has established an analytical test to determine whether an agency interpretation and application of statutory directives receives judicial deference. In Chevron, U.S.A., Inc. V. Natural Resources Defense Council, 4667 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), the Court present a two part test, stating that if the intent of Congress is clearly expressed by the statutory language, then courts as well as agencies must follow the clear statutory directives. Id. Yet, if the intent of Congress is ambiguous, that the reviewing court must give deference to reasonable interpretations and applications of the statute presented by the agency. Id. In the present instance, one statutory directive, that the regulator must find a "public convenience and advantage" before permitting a bank to establish a new branch, IC 28-2-13-19 West Ann.Ind. Code (1987 and Supp. 1994), does not specifically indicate which factors the bank regulator must consider in its ultimate conclusion on the issue and is therefore ambiguous. Applying the lesson of Chevron, reviewing courts must give effect to the agency analysis if reasonable, including the choice of factors to be studies, because of the statutes ambiguity.

In addition, one court found that "what constitutes 'public convenience and necessity' is primarily an administrative question with a number of imponderables to be taken into consideration." State ex. rel. Banking Comm. V. Avery Co. Bank, 188 S.E.2d 9, 10 (Ct.App.N.C. 1972), cert. denied 189 S.E.2d 35 (N.C. 1972). The court continued by stating that since there are so many possible factors to be considered, courts must **permit the regulator to adopt a flexible approach as to which ones the agency chooses to analyze in different situations.** Id. In State Banking Bd. v. First St. Bank of Gainsville, 618 S.W.2d 905 (Civ.App.Tex. 1981), the court stated that the agency should have discretion to implement the purpose of the statutory provision when such implementations are reasonable. Id. At 908, 909; see also Chevron.

The Minnesota Supreme Court provided a list of twelve factors which the bank regulator might consider when deciding whether to grant a new bank charter in a sparsely populated area:

(1) number of banks already serving the area in which the proposed bank would locate; (2) size of the area; (3) population of the area; (4) wealth of the residents of the area; (5) commercial and industrial development of the area; (6) potential growth of the area; (7) adequacy of the services being provided by existing banks compared to the needs of the residents and the services to be offered by the proposed bank; (8) capability of existing banks to handle potential growth of the area; (9) convenience of the location of existing banks to residents of the area as compared to convenience of the proposed bank; (10) size of the banks area; (11) dates when the banks in the area were established; and (12) the number of persons in the area who desire to use the proposed bank and the among of business they would generate.

Jackson v. Valley Nat. Bank of Eagen Twnshp., 152 N.W. 2d 472, 474 (Minn. 1967).

The Virginia Supreme Court supported the State Corporation Commission's review of four factors as to the convenience and advantage of granting another small loan license to an existing company. Those factors included the following: an additional source of credit for the community's least creditworthy borrowers; the convenience provided to existing customers; additional services provided by the additional office; and increased, but beneficial, competition. Peoples Fin. Service of Waynesboro v. Beneficial Fin. Corp., 263 S.E.2d 59, 62 (Va. 1980). Another court considered the rapid growth and development of the population, commerce, and industry of a metropolitan area as factors in the analysis of whether to grant a new bank charter. Suburban Bank of Kansas City v. Jackson Co. St. Bank, 330 S.W.2d 183, 185, 186 (K.C.Ct.App.Mo. 1959). One Indiana court concluded that the **effect of competition should be the determining factor only "where the possibility exists that the existing bank would collapse, or its business would be severely damaged. (emphasis added)"** Department of Fin. Inst'n v. Wayne Bank and Trust Co., 178 Ind.App.265, 277, 278, 385 N.E.2d 484,484 (Ind.App.1979), quoting Department of Fin. Inst'n. V. Wayne Bank and Trust Co., 381 N.E.2d 1100, 1106, 1107 (Ind.App. 1978). See also First Nat. Bank of Vicksburg v. Martin, 238 So.2d 856, 859 (Miss. 1970); Chimney Rock Nat. Bank of Houston v. State Banking Bd., 376 S.W.2d 595, 598-602 (Civ.App.Tex. 1964).

One author created a list of factors which bank regulators might consider in the "convenience and advantage" analysis:

(1) Location of the proposed establishment; (2) the area to be served by the new establishment; (3) the number, type, and size of the existing financial institutions; (4) the services provided by the existing institutions; (5) the population growth of the area to be served; (6) the estimated growth of the population; (7) the income classification of the residents; (8) the volume of business conducted within the proposed area; (9) the future building and commercial developments of the area; (10) the proximity to industrial centers; (11) the estimated growth of the products of the industries within the proposed area; (12) the nature of the agricultural business of the area, if any; and (13) the local opinion of the residents and commercial and industrial executives as to the need for additional banking structures within the area. 74 Banking L.J. 921, 931-939 (1957).

#### IV. Conclusion

With an understanding of the issues discussed in this analysis, the Department has a sound basis for adopting the expressed conclusions of this memorandum as the position of the Department in future applications and interpretations of the standards discussed.